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13
14 **UNITED STATES DISTRICT COURT**
15 **CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

16 MEGAN SCHMITT, DEANA
17 REILLY, CAROL ORLOWSKY, and
STEPHANIE MILLER BRUN,
18 individually and on behalf of
themselves and all others similarly
19 situated,

20 Plaintiffs,

21 v.

22 YOUNIQUE, LLC

23 Defendant.

Case No. 8:17-cv-01397-JVS-JDE

**DEFENDANT YOUNIQUE, LLC'S
OPPOSITION TO PLAINTIFFS' EX
PARTE APPLICATION TO
MODIFY SCHEDULING ORDER**

*[Filed Concurrently with Declaration of
Jonathan D. Moss in Support Thereof]*

The Hon. James V. Selna
Santa Ana, Courtroom 10C

SACC filed: January 4, 2018
Trial Date: Februarv 19. 2019

1 **I. INTRODUCTION**

2 Plaintiffs *ex parte* application should be denied. The application is
3 procedurally improper as there is no “crisis” justifying extraordinary relief. Further,
4 the application does not demonstrate “good cause” necessary to further modify the
5 Court’s Scheduling Order again.

6 The parties already stipulated to modify the Court’s Scheduling Order in May
7 2018, which the Court granted. (Declaration of Jonathan D. Moss (“Moss Decl.”),
8 ¶¶ 5-6, Ex. A-B; Dkt Nos. 66, 67.) The impetus for defendant Yunique, LLC
9 (“Yunique”) agreeing to the stipulation was to permit Yunique to commence the
10 depositions of the four Plaintiffs. Although Yunique had served deposition notices
11 earlier in April, Plaintiffs’ counsel had yet to provide dates for Plaintiffs’
12 depositions. In order to permit those four depositions, a potential third-party
13 deposition by Yunique and Plaintiffs’ Rule 30(b)(6) deposition of Yunique to go
14 forward after the Discovery Cut-Off, the parties stipulated to continue the last day to
15 schedule to commence *those depositions only* beyond the June 1, 2018 Discovery
16 Cut-Off. (Dkt. No. 66, the “Stipulation”.) The parties further agreed to continue
17 Plaintiffs’ deadline to file their class certification motion from June 1, 2018 to
18 August 1, 2018, continue the briefing schedule and hearing date on that motion, and
19 also continue the mediation completion deadline to August 31, 2018. (*Id.*) The
20 Court granted the Stipulation and entered the proposed order submitted by the
21 parties. The Order made clear that: “Except as otherwise stated herein, the other
22 dates and deadlines in the December 11, 2017 Minute Order (Dkt. 56 & 56-1) and
23 Order re: Jury Trial (Dkt. 57) shall continue to apply.” (Dkt. 67.) This includes the
24 June 1, 2018 Discovery Cut-Off.

25 Plaintiffs’ purported basis for the *ex parte* relief is that they did not learn until
26 July 11 that it was Yunique’s position that Plaintiffs may not notice additional
27 depositions or serve document subpoenas several weeks after the Discovery Cut-
28 Off. As set forth below, that contention is contrary to the parties’ discussions

1 leading up to the Stipulation, the Court's May 29 Order granting the Stipulation, and
2 the parties' dealings after the Order, during which the parties proceeded to schedule
3 the depositions of the four Plaintiffs and the Rule 30(b)(6) deposition of Younique,
4 as contemplated by the Stipulation. Thus, there is no surprise or emergency
5 justifying *ex parte* relief.

6 There is also no good cause to further modify the Scheduling Order at this
7 time. Plaintiffs' request for relief is an attempt to retroactively modify case
8 deadlines to accommodate discovery that Plaintiffs served well after the Discovery
9 Cut-Off. Specifically, on July 12, 2018, Plaintiffs impermissibly noticed four
10 individual depositions of various Younique employees to occur on July 24-July 26,
11 served a notice of deposition for a second Rule 30(b)(6) deposition of Younique for
12 July 27, and also served a notice of subpoena to a third-party. (Moss Decl. ¶ 13.)
13 All of Plaintiffs' untimely notices were served nearly six weeks after the Discovery
14 Cut-Off.

15 The purported "discovery issues" that Plaintiffs complain about relative to
16 Younique's production of certain cost data and sales data beyond the four states at
17 issue in the litigation, are positions that Plaintiffs have known of dating back to
18 March 2018 when Younique served its responses to Plaintiffs' document requests.
19 Two days ago, Plaintiffs informed Younique that they would like to pursue an
20 informal discovery conference with Magistrate Judge John Early. Younique has
21 agreed and provided its positions to Plaintiffs for submission to Judge Early despite
22 the late notice from Plaintiffs. Accordingly, Plaintiffs will have an opportunity to
23 raise their purported discovery issues with the Magistrate Judge, which is an
24 additional reason why there is no good cause for Plaintiffs' application and why it
25 should be denied.

26 **II. LEGAL STANDARD**

27 "*Ex parte* applications are solely for extraordinary relief and should be used
28 with discretion." Selna Initial Order, Dkt. 37, citing *Mission Power Engineering*

1 *Co. v. Continental Casualty Co.*, 883 F. Supp. 488 (C.D. Cal. 1995). *Ex parte* relief
 2 is “disfavored when relief may be had through a regularly noticed motion. Such
 3 relief will be granted only upon an adequate showing of good cause or irreparable
 4 injury to the party seeking relief.” *Schneidereit v. Trust of the Scott & Brian, Inc.*,
 5 2012 U.S. Dist. LEXIS 194026, n. 3 (C.D. Cal. Dec. 19, 2012) (J. Selna) (noting
 6 that court would have denied *ex parte* relief). It is not enough for the moving party
 7 to show that there is a “crisis” at hand; rather, that party must establish how the
 8 crisis came to be. *Mission Power*, 883 F. Supp. at 493. For instance, when
 9 discovery-related issues are raised by the application, the moving party must show
 10 that it “used the entire discovery period efficiently and could not have, with due
 11 diligence, sought to obtain the discovery earlier in the discovery period.” *Id.* In
 12 short, “[e]*x parte* applications are not intended to save the day for parties who have
 13 failed to present requests when they should have.” *Id.*

14 In addition to the showing required to obtain *ex parte* relief, a party seeking to
 15 modify a scheduling order must establish “good cause” for the modification. Fed.
 16 R. Civ. P. 16(b)(4). The “good cause” standard “primarily considers the diligence
 17 of the party seeking the amendment.” *Johnson v. Mammoth Recreations*, 975 F.2d
 18 604, 609 (9th Cir. 1992); see *Herman v. Lowe’s Home Improvement*, 2015 U.S.
 19 Dist. LEXIS 187220, *4 (C.D. Cal. Oct. 15, 2015) (denying *ex parte* to modify
 20 scheduling order; even though plaintiff had demonstrated some diligence, it was
 21 insufficient to meet the Rule 16 “good cause” standard). In evaluating diligence, the
 22 key factors are whether the moving party has both diligently prosecuted the case and
 23 been diligent in seeking to amend the Rule 16 order, once it became clear that
 24 compliance was not possible. *York v. Starbucks Corp.*, 2012 U.S. Dist. LEXIS
 25 190086, *24 (C.D. Cal. Sept. 12, 2012) (citing *Jackson v. Laureate, Inc.*, 186 F.R.D.
 26 605, 608 (E.D. Cal. 1999)). For instance, in *York* (a class action case), the court
 27 denied the motion to modify the scheduling order because, among other things, the
 28 plaintiff waited three months to serve discovery and delayed in beginning her survey

1 of class members. *York*, 2012 U.S. Dist. LEXIS at *30-31. The court found that
 2 “had plaintiff acted promptly and diligently,” she would have obtained the discovery
 3 she needed to prosecute her case. *Id.*

4 **III. PLAINTIFFS HAVE FAILED TO ACT DILIGENTLY AND THE**
 5 **REQUESTED EX PARTE RELIEF IS NOT JUSTIFIED**

6 **A. The Parties Already Stipulated To Modify the Court’s Scheduling**
 7 **Order Once Due To Delays in Plaintiffs Appearing for Deposition**

8 On December 11, 2017, the Court entered its Scheduling Order (Dkt. 56 &
 9 56-1) and Order re: Jury Trial (Dkt. 57). The Court set the Discovery Cut-Off as
 10 June 1, 2018. (Dkt. 56; 56-1.)

11 On February 14, 2018, Younique served document requests and special
 12 interrogatories on the four Plaintiffs. On March 14, 2018, Plaintiffs served their
 13 written responses and objections to Younique’s document requests and special
 14 interrogatories. In total, Plaintiffs only produced *eight pages* of documents
 15 collectively among the four Plaintiffs (PL00001-PL00008), which consisted of two
 16 receipts, a chart and a letter. (Moss Decl., ¶ 2.)

17 On April 18, 2018, Younique served notices for the depositions of plaintiffs
 18 Megan Schmitt, Deana Reilly, Carol Orlowsky and Stephanie Miller Brun for May 1
 19 and May 7-9, 2018, respectively. (Moss Decl., ¶ 3.) In doing so, Younique was
 20 mindful that the Court’s Order re: Jury Trial required that “[a]ll depositions shall be
 21 scheduled to commence at least five (5) working days prior to the discovery cut-off
 22 date,” which was June 1, 2018. (Dkt. 57, p. 2, ¶4(a).)

23 On April 27, 2018, Plaintiffs served objections to each of the deposition
 24 notices “on the ground that the deposition cannot go forward on the date set due to
 25 the unavailability of Plaintiffs and their counsel.” (Moss Decl., ¶ 4.)

26 On or about May 4, 2018, Plaintiffs’ counsel proposed that the parties enter
 27 into a stipulation to continue certain deadlines in the Scheduling Order. Younique’s
 28 counsel indicated that it would consider the request and asked that Plaintiffs’

1 counsel prepare a draft stipulation for review. Younique's counsel also followed-up
2 regarding dates for the depositions of the four Plaintiffs. (Moss Decl., ¶ 5.)

3 On May 15, 2018, Plaintiffs' counsel sent the draft stipulation for review.
4 Between May 15 and May 17, 2018, the parties negotiated the terms of the
5 stipulation and Plaintiffs filed the agreed-upon "Stipulation to Modify Scheduling
6 Order and Order on Jury Trial" on May 18, 2018 (the "Stipulation"). (Moss Decl., ¶
7 6, Ex. A, Stipulation (Dkt. No. 66).)

8 **B. The Stipulation and Resulting Order Addressed Specific Deadlines**
9 **Relating to the Scheduling of Certain Depositions Only and Did**
10 **Not Otherwise Modify the June 1, 2018 Discovery Cut-Off**

11 The impetus for Younique agreeing to the Stipulation was to permit Younique
12 to commence the depositions of the four Plaintiffs and a potential third-party
13 deposition after the June 1, 2018 Discovery Cut-Off because Plaintiffs had not yet
14 provided dates for Plaintiffs' depositions. To that end, the Stipulation included the
15 following Recitals:

16 6. Whereas, on April 18, 2018, Defendant Younique, LLC
17 served deposition notices to take the depositions of Plaintiffs Megan
18 Schmitt, Deana Reilly, Carol Orlowsky and Stephanie Miller Brun on
19 May 1, 2018 and May 7, 2018, May 8, 2018 and May 9, 2018,
respectively;

20 7. Whereas, on April 27, 2018, Plaintiffs' counsel served
21 objections to the deposition notices asserting that the Plaintiffs'
22 depositions could not go forward due to unavailability of Plaintiffs and
their counsel;

23 8. Whereas the parties are currently working with each other
24 on a deposition schedule for Plaintiffs' depositions and a third-party
25 deposition (Lori DeBell) that takes into account all counsels' travel and
26 trial calendars, given that several Plaintiffs and the third-party deponent
reside out of state;

27 (Dkt. 66, p. 3, ¶¶ 6-8.)
28

In order to permit those four depositions and a potential third-party deposition by Younique to go forward and to permit Plaintiffs to take a Rule 30(b)(6) deposition of Younique, the parties stipulated to continue the last day to schedule to commence *those depositions only* beyond the June 1, 2018 Discovery Cut-Off. The relevant portion of the Stipulation reads as follows:

<i>Case Management Event:</i>	<i>Prior-Operative Date-Deadline:</i>	<i>NEW Date-Deadline:</i>
Last day to schedule to commence the depositions of Plaintiffs Megan Schmitt, Deana Reilly, Carol Orlowsky and Stephanie Miller Brun and third-party Lori DeBell, and Rule 30(b)(6) deposition of Defendant Younique, LLC	May 24, 2018	July 30, 2018

(Dkt. 66, p. 3.) Nowhere did the parties stipulate to continue the Discovery Cut-Off date.

The Court's resulting order entering the Stipulation is clear that the Court extended to July 30, 2018 the "last day to schedule and commence" just these specified depositions. (Dkt. 67.) The Order further reads that: "Except as otherwise stated herein, the other dates and deadlines in the December 11, 2017 Minute Order (Dkt. 56 & 56-1) and Order re: Jury Trial (Dkt. 57) shall continue to apply." This includes the June 1, 2018 Discovery Cut-Off. *Notably, the Court's Order is consistent with the Proposed Order submitted by the parties and filed by Plaintiffs* (compare Dkt. 66-1 to Dkt. 67, which are the same.)

In other words, Plaintiffs' contention in their *ex parte* application that the "fact discovery deadline" is July 30, 2018, rather than June 1, 2018, is contrary to the parties' agreement and this Court's Order. (See *e.g.* Application at 2:7-8; 3:12-13; 4:5-6.) Correspondence between the parties' counsel confirms that the parties always understood and agreed that the extension was limited to these specified depositions:

- 1 • Sascha Henry's (Younique's counsel) email to Alison Bernal (Plaintiffs'
 2 counsel) on 5-16-18: "We are also willing to extend the discovery cutoff to
 3 give plaintiffs more time to appear for their depositions which we noticed in
 4 April. We haven't heard from you about any other discovery that plaintiffs
 5 need to complete other than appearing for their depositions. The time to
 6 propound written discovery has already passed, and the last day to commence
 7 depositions is May 24."
- 8 • Jonathan Moss (Younique's counsel) email to Bernal on 5-16-18: "Sascha is
 9 traveling at the moment, so I wanted to respond with a point of clarification.
 10 Your additional edit to the stipulation revises the first row of the table in
 11 Paragraph 8 to add 'and depositions of Defendants.' But there is only one
 12 Defendant (Younique LLC). When you say Defendants, do you mean to refer
 13 to a Rule 30(b)(6) deposition of Younique, LLC?"
- 14 • Bernal email to Moss 5-16-18: "Thank you for that clarification. Yes, I
 15 intended it to mean the 30(b)(6) deposition(s)."
- 16 • Bernal email to Moss 5-29-18: "Separately, we will be noticing a 30(b)(6)
 17 deposition. We are currently working on the topics, and can get those to you
 18 shortly. In the meantime, we want to get the ball rolling on agreeing to a date
 19 for that deposition(s). Rather than unilaterally setting a date, are there specific
 20 dates that work for you and your client? Also, will that deposition take place
 21 in Utah?"
- 22 • Moss email to Bernal 5-30-18: "With respect to the 30(b)(6) deposition of
 23 Younique, the deposition will take place in Utah. We believe it is too early to
 24 provide specific available dates for the 30(b)(6) deposition at this point
 25 without the deposition notice as the topics will impact the particular
 26 deponent(s) who would appear. But, we will work with you on scheduling a
 27 convenient time for that deposition when we have more information."

28 (Moss Decl., ¶¶ 8-9, Exs. C-D.)

**C. There Is No "Crisis" or "Irreparable Harm" Justifying Further
Modification of the Court's Scheduling Order**

As a result of the stipulation, on June 4, 2018, Plaintiffs served a Rule 30(b)(6) deposition notice of Younique. Plaintiffs noticed the deposition for July 17, 2018 in Utah. That deposition (the only deposition noticed by Plaintiffs that

1 Younique and the Court agreed to extend beyond the Discovery Cut-Off) is set to go
2 forward on July 27, 2018. (Moss Decl, ¶ 10.)

3 With respect to the depositions of Plaintiffs, Plaintiffs' counsel produced
4 plaintiffs Brun, Orłowski and Reilly for deposition on June 25-27, 2018,
5 respectively. Notably, during their depositions in late June, certain plaintiffs
6 identified additional documents responsive to Younique's document requests served
7 in February 2018 that were not included in Plaintiffs' eight-page document
8 production (some of which, according to deposition testimony, were apparently
9 provided to Plaintiffs' counsel, but not produced to Younique). (Moss Decl., ¶ 11.)
10 Despite repeated requests from Younique dating back to April 2018 to schedule a
11 date for the deposition of plaintiff Megan Schmitt, Plaintiffs have still yet to confirm
12 a date for Younique to take Ms. Schmitt's deposition. (Moss Decl., ¶ 12.)

13 Plaintiffs' contention that they "first learned" on July 11, 2018 that it was
14 Younique's position that Plaintiffs may not notice additional depositions or serve
15 document subpoenas several weeks after the Discovery Cut-Off is dubious. (*See*
16 *e.g.* Application at 2:6-2:8; 3:2-6; 5:20-24.) That contention is contrary to the
17 parties' dealings and motivation for the Stipulation, which concerned extending the
18 deadline for specific depositions only. (*See* Section III(a)-(b), *supra*). It is also
19 contrary to the plain language of the Stipulation and Order dated May 29, 2018.
20 (Dkt. Nos. 66-67.) It is also contrary to the parties' dealings between May 29-July
21 11, 2018, during which the discussions between the parties' counsel concerned only
22 the depositions of the four Plaintiffs and a Rule 30(b)(6) deposition of Younique.

23 Plaintiffs noticed the Rule 30(b)(6) deposition of Younique for July 17, 2018.
24 On July 5, 2018, Younique's counsel contacted Plaintiffs' counsel to meet and
25 confer regarding certain categories in the deposition notice. (Moss Decl., ¶ 10.)
26 The parties' counsel continued to meet and confer between July 5 and July 17
27 regarding the topics and date of the deposition. (*Id.*) The deposition is set to go
28

1 forward on July 27, 2018 in Utah. (*Id.*) In sum, there is no surprise or emergency
2 justifying a change in the Scheduling Order or *ex parte* relief.

3 **IV. THERE IS ALSO NO GOOD CAUSE TO MODIFY THE**
4 **SCHEDULING ORDER**

5 Plaintiffs' request that the Court modify the Scheduling Order is a belated
6 attempt to retroactively modify case deadlines to accommodate late-served
7 discovery. On July 12, 2018, Plaintiffs impermissibly noticed four individual
8 depositions of various Younique employees (Dixie Memmott, Whitney Goff,
9 Melanie Huscroft, Reggie Rappleye) to occur on July 24-July 26, served a notice of
10 deposition for a second Rule 30(b)(6) deposition of Younique for July 27, and also
11 served a notice of subpoena to third-party Coyne Public Relations. (Moss Decl. ¶
12 13.) All of Plaintiffs' untimely notices were served nearly six weeks after the June
13 1, 2018 Discovery Cut-Off.

14 Thus, Plaintiffs have served deposition notices and third-party discovery after
15 the operative discovery cut-off of June 1. Importantly, a motion to extend a
16 deadline must be made "before the original time or its extension expires," and may
17 be granted if filed after the time has expired only "if the party failed to act because
18 of excusable neglect." Fed. R. Civ. P. 6(b)(1)(B). Plaintiffs' delay and lack of
19 diligence in pursuing discovery is not excusable.

20 The timing of Younique's production of documents in this litigation is
21 reasonable given the scope of documents requested and does not justify the relief
22 sought. On March 16, 2018, Younique served its written responses to Plaintiffs'
23 requests for production of documents. On April 27, 2018, Younique produced 345
24 pages of documents to Plaintiffs, which included: (a) marketing assets; (b)
25 catalogues; (c) monthly sales data relating to the product at issue in the litigation for
26 the four states at issue (consistent with a discussion that the parties' counsel had on
27 March 5 regarding the format that Younique would produce the requested data); and
28 (d) independent presenter agreements.

1 Nearly two months after Younique served its written responses to the
2 document requests, on May 14, 2018, Plaintiffs sent a meet and confer letter
3 concerning Younique's responses. On June 6, 2018, Younique produced the
4 remaining documents it agreed to produce in response to Plaintiffs' requests
5 (YNQE0000346-5946). On June 7, 2018, Younique sent a letter responding to
6 Plaintiffs' meet and confer letter dated May 14, 2018. (*See* Application at 5:14-16.)
7 The timing for Younique to complete the document production was the result of
8 Younique's substantive response to Plaintiffs' requests, as contrasted with Plaintiffs'
9 eight-page document production, which Younique has since learned was
10 incomplete.

11 Younique's positions with respect to document production were made clear in
12 its written responses served on March 16 and further explained in its meet and
13 confer letter response. Notably, Younique's second document production and
14 response to Plaintiffs' meet and confer letter were made prior to Plaintiffs' deadline
15 to bring a discovery motion under the Court's Scheduling Order. (Dkt. 57, which
16 specified that discovery motions may be served by June 11, 2018, *i.e.* 10 days after
17 the Discovery Cut-Off). Younique's document production was consistent with its
18 written responses served in March. Plaintiffs could have brought a motion to
19 compel within the time permitted by the Scheduling Order, but chose not to do so.

20 Younique's document production was also well in advance of Plaintiffs'
21 forthcoming Rule 30(b)(6) deposition of Younique. Further, Plaintiffs did not issue
22 the individual deposition notices and subpoena in question until July 12, 2018,
23 several weeks after Younique's second document production and the June 1
24 Discovery Cut-Off.

25 To the extent that the "Requested Relief" section of Plaintiffs' application
26 states that the current last date to commence fact witness and party depositions is
27 July 30, 2018 (*see* Application at 4:5-4:6), that is inaccurate for the reasons
28 discussed above. The agreed-upon August 1, 2018 deadline for Plaintiffs to file

1 their class certification motion is entirely reasonable, as it is approximately eight
2 weeks after the Discovery Cut-Off. Plaintiffs refer to the August 1, 2018 deadline to
3 file a class certification motion as a “typographical error,” (*see* Application at p. 3,
4 fn. 1) but this was the date agreed-to by the parties and ordered by the Court. The
5 parties stipulated to continue Plaintiffs’ deadline to file a class certification motion
6 from June 1, 2018 to August 1, 2018. (Dkt. 66.) In other words, the current
7 deadline already amounts to a 60-day extension from the original deadline for
8 Plaintiffs to file a class certification motion. (Dkt. 56.)

9 Plaintiffs have created an artificial “emergency,” and have demanded that
10 Younique respond in an unreasonably short time frame. On July 17, 2018 at 3:21
11 p.m., Plaintiffs’ counsel sent a draft email that Plaintiffs proposed to send to
12 Magistrate Judge Early requesting a pre-discovery motion conference regarding
13 various purported issues. (Gonnelli Decl., Ex. 1.) Plaintiffs requested that
14 Younique send its positions to insert in the email by close of business the next day.
15 (*Id.*) The next day, July 18, 2018 at 4:25 p.m., Younique’s counsel responded: “We
16 will try to get you Younique’s position with respect to your email by close of
17 business today. But due to short notice and scheduling issues, we may not be able to
18 provide until tomorrow morning.” (Gonnelli Decl., Ex. 1.) The scheduling issues
19 included that Younique’s lead counsel was in meetings all day on July 17-18 and
20 would be in a deposition on July 19, which Younique’s counsel conveyed to
21 Plaintiffs’ counsel. (Moss Decl., ¶ 15.)

22 At 5:36 p.m. in the evening on July 18, Plaintiffs filed their *ex parte*
23 application and notified Younique that it must file any opposition within 24 hours.
24 (Moss Decl. ¶ 16.) Later that evening, Younique’s counsel provided its position
25 statement for inclusion in the joint email to Magistrate Judge Early. (Moss Decl., ¶
26 17.) The parties’ joint email requests a conference with Judge Early. (*Id.*)

27 Accordingly, Plaintiffs will have an opportunity to raise their purported
28 discovery issues with the Magistrate Judge. The Magistrate Judge may consider the

1 timeliness and merit of Plaintiffs' purported discovery issues. This is an additional
2 reason why there is no good cause for Plaintiffs' relief requested of the Court.

3 **V. CONCLUSION**

4 For the reasons stated above, Plaintiffs' *ex parte* application should be denied
5 and the Court should not further modify the Scheduling Order at this time.

6
7 Dated: July 19, 2018

8 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

9
10 By

/s/ Jonathan D. Moss

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